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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. ——

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RELIANCE FUEL OIL CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit entered in this case.

OPINIONS BELOW

The opinions of the court below (Appendix, *infra*, pp. 16–29) are reported at 297 F. 2d 94. The findings of fact, conclusions of law, and order of the Board (B.A. 4–52)[1] are reported at 129 NLRB 1166.

JURISDICTION

The judgment of the court of appeals remanding the case to the Board was entered on November 13, 1961 (Appendix, *infra*, pp. 26–27). The order of the court of appeals denying the Board's petition for re-

[1] "B.A." refers to the portion of the record printed as the Board's Appendix in the court below.

hearing was entered on January 4, 1962 (Appendix, *infra*, p. 29). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether the Board may properly conclude that the operations of an employer engaged in a wholly local business "affect commerce" within the meaning of the National Labor Relations Act by reason of the fact that he purchases, within the State, substantial quantities of supplies from a supplier who has imported them from outside the State.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are as follows:

> SEC. 2. When used in this Act—
>
> * * * * *
>
> (6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.
>
> (7) The term "affecting commerce" means in commerce, or burdening or obstructing com-

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merce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

STATEMENT

A. *The Board's Decision and Order.*—The Board found that respondent violated Sections 8(a) (1), (2), (3), and (5) of the Act by, *inter alia,* according exclusive recognition to Local 355[2] at a time when it was obligated to recognize Local 553,[3] refusing to bargain with Local 553, and restraining and coercing its employees to abandon Local 553 and join Local 355 (B.A. 4–5, 43–44, 24–29, 29–33, 35–36, 36–38, 40–42). The Board ordered respondent to cease and desist from the unfair labor practices found, and to take appropriate affirmative action to undo the effects of its illegal conduct (B.A. 5–9). The only question here relates to the propriety of the Board's conclusion that it had jurisdiction over respondent's operations. The underlying facts on which the Board based this conclusion are as follows:

---

[2] Amalgamated Local Union 355, Retail, Wholesale and Department Store Union, AFL–CIO.

[3] Coal, Gasoline, Fuel Oil Teamsters, Chauffeurs, Oil-Burner Installation, Maintenance Servicemen and Helpers, Local Union 553, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Respondent Reliance is a New York corporation with its principal office and place of business in Massapequa, Long Island, New York (B.A. 12). It is engaged in the business of selling fuel oil for heating purposes, and servicing oil burners and boilers (B.A. 12–13). Its customers are homeowners located in the State of New York (B.A. 13). During the fiscal year ending June 30, 1959, respondent's gross sales exceeded $500,000 (B.A. 13). During the calendar year 1959, it purchased from the Gulf Oil Corporation fuel oil and related products valued at more than $650,000 (B.A. 13; 57, 135–136). Gulf Oil Corporation, which is engaged in the retail and non-retail sale of fuel and related products, operates in New York and other States, and is concededly engaged in interstate commerce (B.A. 13–14; 134, 135–136). Gulf's gross sales and operating revenues in 1959, including consumer excise taxes, exceeded $3,170,000,000 (B.A. 13–14; 136). Most of the products sold and delivered to Reliance by Gulf are refined by the latter outside New York State, delivered into Gulf's storage tanks at New York City, and then transferred to Gulf's stationary storage tanks at Oceanside, Long Island, without segregation according to customers (*ibid.*). Respondent's trucks load oil from Gulf's Oceanside tanks, and from there deliver it either directly to Reliance's customers or to Reliance's tanks at Massapequa, from which it is later withdrawn and delivered to customers (B.A. 13).[4]

[4] The record also showed that in 1959, respondent purchased a few hundred dollars worth of truck parts in New Jersey (B.A. 13). In asserting jurisdiction, however, the Board did not rely on these transactions.

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On the basis of these facts, the Board found that respondent's operations affected interstate commerce within the meaning of the Act (B.A. 15), and further, that respondent's unfair labor practices "tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce, and constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act" (B.A. 44).[5]

B. *The Decision of the Court of Appeals.*—The court below found that the Board's findings on the merits were "adequate and adequately supported by substantial evidence," and that the Board's order should be enforced in full "if the Board had jurisdiction over the dispute" (Appendix, *infra,* p. 20). However, the court held that the record did not adequately prove the existence of legal jurisdiction and remanded the case to the Board "to take further evidence and make further findings on the manner in which a labor dispute at Reliance affects or tends to affect commerce" (Appendix, *infra,* p. 26).

Noting that in *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U.S. 197, and *Howell Chevrolet Co.* v. *National Labor Relations Board,* 346 U.S. 482, the jurisdictional determination was not predicated on the fact that there were substantial intrastate purchases which originated outside the State, the court below indicated that that factor alone would not be sufficient to permit Congress to regulate

[5] The Board also found that, since respondent's gross sales were in excess of $500,000 per year, its operations satisfied the Board's discretionary standards for the exercise of its legal jurisdiction (B.A. 14–15).

a local business (Appendix, *infra,* pp. 23–25). Accordingly, it concluded that "a reasonably complete picture of the manner in which a work stoppage would affect commerce should be required before we rule on the jurisdictional issue" (Appendix, *infra,* p. 25). The court remanded the case so that the Board would ascertain various facts tending to show that a work stoppage would in fact impede the flow of commerce into the State.

The Board filed a petition for rehearing, which petition was denied in a supplemental opinion (Appendix, *infra,* pp. 27–28). The court of appeals there held that it was "clear" that Congress could constitutionally regulate the labor dispute here, and that the problem presented was only one of statutory interpretation. Interpreting the definition of "affecting commerce" in Section 2(7) of the Act, the court again concluded that the Board had jurisdiction over employers not themselves engaged in interstate commerce only if the labor dispute actually hindered or obstructed interstate commerce; the mere purchase of substantial amounts of supplies which originated outside the State would not be sufficient.

REASONS FOR GRANTING THE WRIT

Section 10(a) of the National Labor Relations Act gives the Board power "to prevent any person from engaging in any unfair labor practice * * * affecting commerce." The phrase "affecting commerce" is defined in Section 2(7) to mean "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free

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flow of commerce." The court of appeals below held in both its initial opinion and its opinion denying rehearing that the Act did not confer on the Board jurisdiction over labor disputes involving a local business whose impact on interstate commerce stemmed solely from the fact that it purchased substantial quantities of supplies which originated outside the State.

In the supplemental opinion, the court reasoned that the Act did not give the Board all the power which Congress could constitutionally confer under the commerce clause and therefore held (Appendix, *infra*, p. 28):

> * * * Congress intended the court to examine whether or not a labor dispute involving only employers not engaged in interstate commerce did or did not directly or indirectly hinder or obstruct interstate commerce. Had Congress meant to give the Board jurisdiction of all labor disputes involving employers who purchased more than a *de minimis* amount of supplies which had at one time moved in interstate commerce, it would have been easy enough to say so.

The original opinion, which apparently treated the jurisdiction of the Board under the Act and the constitutional power of Congress as coextensive, was somewhat less clear. It did, however, require the Board to show how "a work stoppage would affect commerce." Therefore, the court remanded the case to the Board to ascertain "the volume of commerce in heating oils in the relevant market, Gulf's participation therein, Reliance's contract relationship, if any, with Gulf's national distribution system, Re-

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liance's proportion of Gulf's commerce in the relevant market, or the number and availability of alternate distributors to Gulf and to Reliance's customers" (Appendix, *infra,* pp. 25–26).

Thus, the court held that, in order to assume jurisdiction under the Act, the Board was required to prove that the labor dispute had an actual impact on commerce, and it ruled that the purchase of substantial supplies originating outside the State was not enough in itself to show such an impact. This holding should be reviewed by this Court because (1) it is erroneous and is inconsistent with controlling decisions of this Court and with decisions in courts of appeals; (2) it is inconsistent with the provisions of Section 14(c)(1) of the Act; and (3) it will seriously interfere with the efficient functioning of the Board.

1. *a.* The holding of the court below in its supplemental opinion denying rehearing is directly, on its face, inconsistent with decisions of this Court. The court of appeals admitted in its supplemental opinion that Congress clearly has the constitutional power to regulate the labor dispute involved in this case. Nevertheless, the court of appeals held that the Board was without jurisdiction since the jurisdiction conferred by the National Labor Relations Act on the Board is less than Congress' constitutional power over commerce. This Court has several times held to the contrary. *Guss* v. *Utah Labor Relations Board,* 353 U.S. 1, 3; *Polish National Alliance* v. *National Labor Relations Board,* 322 U.S. 643, 647; *National Labor Relations Board* v. *Fainblatt,* 306 U.S. 601, 606–607. As was said in the *Guss* case:

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> Since it was first enacted in 1935, the National Labor Relations Act has empowered the National Labor Relations Board "to prevent any person from engaging in any unfair labor practice * * * [defined by the Act] affecting commerce." By this language and by the definition of "affecting commerce" elsewhere in the Act, Congress meant to reach to the full extent of its power under the Commerce Clause. [Footnotes omitted.]

b. The court below held in its first opinion that Congress, and thus the Board, could not constitutionally regulate—and therefore in the Act did not regulate—a local business whose only impact on interstate commerce stemmed from the purchase of substantial quantities of supplies which originated outside the State. That view is likewise contrary to principles established by this Court. In *Amalgamated Meat Cutters* v. *Fairlawn Meats, Inc.*, 353 U.S. 20, 22–23, this Court described the jurisdictional facts as follows (*id.* at 22):

> Respondent operates three meat markets in the vicinity of Akron, Ohio. All of its sales are intrastate, but of its purchases in one year totaling not quite $900,000, slightly more than $100,000 worth came from outside Ohio directly and as much or more indirectly.

On the basis of these facts, this Court simply held that "[w]e do not agree that respondent's interstate purchases were so negligible that its business cannot be said to affect interstate commerce within the meaning of § 2(7) of the National Labor Relations Act" (*ibid.*).

The facts in *Fairlawn Meats* are extremely close to those in the instant case. Here, too, all of the Company's sales were intrastate but its purchases of supplies originated outside the State. Indeed, here, the Company's out-of-State purchases ($650,000) were considerably more in amount and in proportion to the Company's total purchases (almost 100 percent) than that of the employers in the *Fairlawn Meats* case. The only distinction between the two cases is the fact that some of the employer's purchases in *Fairlawn Meats* came directly from outside the State while here all were indirectly purchased in the sense that they were brought by Gulf Oil into the State and then sold within the State to the Company. But this Court did not consider this extremely formalistic and, we believe, irrelevant distinction to be important in holding that the Board had jurisdiction. We therefore submit that the situation in *Fairlawn Meats* case is in all essential respects identical to that involved here and that therefore that decision is fully controlling.[6] See also *National Labor Relations Board*

[6] This conclusion is not impaired by the fact, emphasized by the court below (Appendix, *infra*, pp. 23–25), that in *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, and *Howell Chevrolet Co.* v. *National Labor Relations Board*, 346 U.S. 482, this Court rested its jurisdictional determination on factors other than the products and supplies which had come to the companies there involved across state lines. This merely shows that, since other more dramatic evidence of a connection with interstate commerce existed, the Court found it unnecessary to rest the case on this factor as well.

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v. *Denver Building & Construction Trades Council,* 341 U.S. 675, 683–685.[7]

In addition, the holding below is inconsistent with the general principles repeatedly articulated by this Court to determine the reach of the Act. The court of appeals remanded the case to the Board for findings as to whether a labor dispute at the Company would in fact impede commerce. However, this Court has held that in order for the Board to have jurisdiction, it is not necessary to demonstrate an *actual* impact on commerce, but only the potentiality of such an impact—*i.e.,* whether interstate transportation or the flow of commerce across state lines would tend to be impeded if the business immediately involved, and others like it, were disrupted as a result of a labor dispute caused by unfair labor practices. If so, the Act applies regardless of the volume of interstate commerce affected, provided that it is more than *de minimis. National Labor Relations Board* v. *Denver Building & Construction Trades Council, supra; Polish National Alliance* v. *National Labor Relations Board, supra,* 322 U.S. at 648; *National Labor Relations Board* v. *Bradford Dyeing Assn.,* 310 U.S. 318, 326; *National Labor Relations Board* v. *Fainblatt, supra,* 306 U.S. at 607–608. That test is satisfied here by showing, without more, that the Company purchased more than $650,000 worth of fuel

[7] In *Denver Building*, this Court found that the Board had jurisdiction both because the employer purchased almost all its merchandise either directly or indirectly from outside the State (approximately $86,000 worth) and it shipped $5000 of its products outside the State.

oil from Gulf, which the latter concededly obtained from outside the State. For a shut down of the Company due to a labor dispute would cause it to discontinue purchasing that amount of oil from Gulf, and it is likely that this, in turn, would force Gulf to curtail, or at least delay, further shipments of oil into the State. The potential obstruction to $650,000 worth of out-of-State oil shipments as a result of a labor dispute involving respondent is certainly not *de minimis,* and the impact on commerce is even more substantial when there is added the danger that a labor dispute involving respondent may, if unchecked, spread to other fuel oil dealers in the area. See *Polish National Alliance* v. *National Labor Relations Board, supra,* 322 U.S. at 648.

2. The holding of the court below is also inconsistent with the holdings of other courts of appeals. For example, the Ninth Circuit has held that "[t]he fact that the company, instead of itself buying all its supplies outside the state and shipping them in, * * * has some arrangement whereby someone else ships them in and then it buys them from the shipper after they come into the state, does not destroy the effect of the transactions on interstate commerce." *National Labor Relations Board* v. *Sunshine Mining Co.,* 110 F. 2d 780, 784 (C.A. 9), certiorari denied, 312 U.S. 678. Accord, *National Labor Relations Board* v. *Van De Kamp's Holland-Dutch Bakers,* 152 F. 2d 818, 819–820 (C.A. 9); *National Labor Relations Board* v. *Cowell Portland Cement Co.,* 148 F. 2d 237, 242 (C.A. 9), certiorari denied, 326 U.S. 735; *National Labor Relations Board* v. *Edinburg Citrus Ass'n,* 147 F. 2d

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353, 354 (C.A. 5); *National Labor Relations Board* v. *El Dorado Co.*, 195 F. 2d 950, 955 (C.A. 8); *J. L. Brandeis & Sons* v. *National Labor Relations Board*, 142 F. 2d 977, 980–981 (C.A. 8), certiorari denied, 323 U.S. 751; *National Labor Relations Board* v. *Vulcan Forging Co.*, 188 F. 2d 927, 930 (C.A. 6). Moreover, it has uniformly been held by the courts of appeals that it need not be shown that a labor dispute will actually impede interstate commerce in order for the Board to have jurisdiction. Thus, the availability of substitute facilities, or the amount of commerce actually impeded by the labor dispute, has been held to be immaterial to establish the Board's jurisdiction. *National Labor Relations Board* v. *El Dorado Co., supra*, 195 F. 2d at 952–953 (C.A. 8); *National Labor Relations Board* v. *Mid-Co Gasoline Co.*, 183 F. 2d 451, 452–453 (C.A. 5); *National Labor Relations Board* v. *Phoenix Mutual Life Ins. Co.*, 167 F. 2d 983, 985 (C.A. 7), certiorari denied, 335 U.S. 845.

3. The decision below is also inconsistent with the provisions of Section 14(c)(1) of the Act, which was added by the 1959 Landrum-Griffin Amendment (29 U.S.C. (Supp. II) 164(c)(1)). That section authorizes the Board, "in its discretion," by "rule of decision or by published rules," to "decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction over any labor dispute

over which it would assert jurisdiction under the standards prevailing upon August 1, 1959."

By thus explicitly confirming the Board's authority to define classes or categories of employers in which it would decline to exercise jurisdiction, Congress recognized that the Board's jurisdiction may be defined in terms of the general effect upon commerce of labor disputes involving categories of employers, and need not turn upon a determination of the effect on commerce of any particular labor dispute. The Board's jurisdictional "standards prevailing upon August 1, 1959" were drawn in terms of the total volume of commerce involved for particular classes and categories of employers. Twenty-Third Annual Report, National Labor Relations Board, p. 8.

Section 14(c)(1) leaves no doubt that Congress was familiar with the precise jurisdictional standards in effect upon August 1, 1959. For non-retail businesses, the Board assumed jurisdiction over an employer which had "$50,000 outflow or inflow, direct or indirect"; "indirect inflow" was defined as "the purchase of goods or services which originated outside the employer's State but which he purchased from a seller within the State * * *." *Ibid.;* see *Siemons Mailing Service,* 122 NLRB 81. In the case of retail concerns, the jurisdictional requirement was "$500,000 gross volume of business." Twenty-Third Annual Report, *supra.* The present case, in which the respondent had more than $650,000 in "indirect inflow" and gross

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sales of more than $500,000, satisfied both of these standards. We submit that Section 14(c)(1), therefore, is an irrefragable answer to the Second Circuit's suggestion that the term "affecting commerce" does not, as a matter of statutory construction, cover the present case.

4. The consequences of the lower court's holding transcend this particular case. Since the early days of the Wagner Act, the Board, with judicial approval, has been asserting jurisdiction over a variety of local businesses which affect interstate commerce only indirectly—*i.e.*, through the purchase of goods or sales which originate outside the State, or through the sale of products or services to companies which are themselves engaged in interstate commerce or do business with such firms.[8] If the additional data required by the court of appeals is relevant to a determination of the jurisdictional question in this case, it would appear to be relevant in untold numbers of similar

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[8] In addition to the cases cited *supra*, pp. 12–13, see *Amalgamated Association* v. *Wisconsin Board*, 340 U.S. 383, 391; *Electrical Workers* v. *National Labor Relations Board*, 181 F. 2d 34, 36–37 (C.A. 2), affirmed, 341 U.S. 694; *Shore* v. *Building & Construction Trades Council*, 173 F. 2d 678 (C.A. 3); *National Labor Relations Board* v. *Herald Publishing Co.*, 239 F. 2d 410 (C.A. 9); *National Labor Relations Board* v. *Dixie Terminal Co.*, 210 F. 2d 538 (C.A. 6), certiorari denied, 347 U.S. 1015; *National Labor Relations Board* v. *El Paso-Ysleta Bus Line Co.*, 190 F. 2d 261 (C.A. 5); *National Labor Relations Board* v. *Aurora City Lines* (C.A. 7), February 2, 1962, 49 LRRM 2532.

cases as well.[9] This would call for a drastic revision of the procedures which have heretofore been utilized in the trial of jurisdictional issues and would impose a substantial burden on the Board's processes. Apart from the clear departure from established principles, there are thus compelling administrative considerations why the decision below warrants review by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

STUART ROTHMAN,
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National Labor Relations Board.

MARCH 1962.

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[9] The First Circuit has already followed the lead of the court below, in remanding for additional jurisdictional facts a case involving a local sand and gravel company. *National Labor Relations Board* v. *Benevento*, decided December 29, 1961, 49 LRRM 2307.

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APPENDIX

United States Court of Appeals for the Second Circuit

No. 15—September Term, 1961

(Argued September 29, 1961. Decided November 13, 1961)

Docket No. 26806

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RELIANCE FUEL OIL CORPORATION, RESPONDENT

Before LUMBARD, *Chief Judge,* and FRIENDLY and SMITH, *Circuit Judges.*

On petition for enforcement of an order of the National Labor Relations Board, 129 NLRB No. 141. Enforcement denied. Remanded to the Board for further hearings and additional findings on the basis of the Board's jurisdiction.

Melvin Pollack, Attorney, National Labor Relations Board (Stuart Rothman, General Counsel; Dominick L. Manoli, Asso. Gen. Counsel; Marcel Mallet-Prevost, Asst. Gen. Counsel; and Solomon I. Hirsh, Attorney, National Labor Relations Board, on the brief), for petitioner.

Samuel H. Borenkind, New York, N.Y., for respondent.

SMITH, *Circuit Judge:*

This is a petition of the National Labor Relations Board, pursuant to Section 10(e) of the amended National Labor Relations Act, 29 U.S.C.A. 160(e), for enforcement of a Board order issued against respondent January 5, 1961 reported at 129 NLRB No. 141. Since the alleged unfair practices occurred in Massapequa, Long Island, New York, within this judicial circuit, this court has jurisdiction over the petition for enforcement under Section 10(e). Enforcement denied. Remanded for taking of further evidence and making of additional findings.

Respondent is engaged in the sale of fuel oil for heating purposes and in servicing oil burners and boilers. All of its customers are home owners located in the State of New York. During the calendar year 1959 the respondent purchased from Gulf Oil, which is concededly engaged "in commerce," fuel oil and related products valued at more than $650,000. The largest part of the product sold to respondent is refined outside the State of New York and delivered into Gulf's storage tanks in New York, from where it is shipped to Gulf's stationary storage tanks at Oceanside, Long Island without segregation according to customers. Respondent's trucks withdraw the oil from the Oceanside tanks and deliver it directly to customers.[1]

The respondent employs two principal groups of workers: oil burner service employees numbering approximately 10, and fuel oil drivers numbering approximately 11.

[1] The Board also found that respondent draws a certain amount of oil from other firms' tanks on a barter basis and that a portion of its purchases of truck parts is made outside of New York State which totals "a couple of hundred dollars at the most." As the Board did not rest its jurisdiction on these factors they will not be considered by the court.

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On September 28, 1959, Local 553 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, filed a petition with the Board in Case No. 2–RC–10280, seeking to represent a unit of respondent's servicemen which was later changed to include drivers as well. Previously, in the summer of 1958, Local 355 of the Retail, Wholesale and Department Store Union, AFL–CIO, had unsuccessfully attempted to organize the employees of respondent. Pursuant to the representation petition an election was held; Local 553 received 10 votes, Local 355 received 6 votes, one vote was cast for neither union and four votes were challenged.

Immediately after the election a so-called "shape-up" system was instituted carrying out a threat to institute such a system if Local 553 won the election and the extra-gallonage bonus previously paid drivers was discontinued. On February 14, 1960, Union President Flatow sent a letter to Packman, an officer of the respondent, stating that Local 355 represented a majority of the employees and demanding contract negotiations. The following day a meeting was held and after cursory examination of the signatures on membership cards held by Local 355 a contract was entered into, immediately following which the "shape-up" system was discontinued and the drivers reimbursed for wages lost. Thereafter the respondent withheld $140.00 in dues from employees' wages and remitted this sum to Local 355 during the period February 23 to April 5, 1960. The Board certified Local 553 on March 15, 1960, as the exclusive representative of respondent's employees pursuant to the findings of the Regional Director overruling the challenges to two of the challenged votes. Asserting that the employees had chosen another union, with whom a con-

tract had been signed, respondent refused to bargain collectively with Local 553.

The Board concluded that by its threats, promises, and changes in working conditions for the purpose of influencing the choice of a collective bargaining agent respondent violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1); and that by recognizing and entering into a collective bargaining agreement with Local 355 respondent violated Section 8(a) (2) and (1) of the Act, 29 U.S.C. § 158(a) (2) and (1), by rendering unlawful assistance. Moreover respondent's agreement to, and enforcement of, a contract provision which required membership in the unlawfully assisted union as a condition of employment violated Section 8(a) (3), (2) and (1) of the Act, 29 U.S.C. § 158(a) (3), (2) and (1). Finally, the Board concluded that respondent was guilty of a refusal to bargain in violation of Section 8(a) (5) and (1) of the Act, 29 U.S.C. § 158(a) (5) and (1).

The Board ordered respondent to cease and desist from the unfair labor practices found and from interfering, in any other manner, with the rights of employees guaranteed by Section 7 of the Act, 29 U.S.C. § 157. The Board also ordered respondent to withhold recognition from Local 355 and to cease giving effect to the bargaining agreement with it, unless and until that union is certified by the Board; to reimburse its employees for the dues checked off; and upon request to bargain collectively with Local 553.

Respondent resists enforcement on two grounds: (1) the Board failed to show any evidence of coercion; and (2) the Board was without jurisdiction of the subject matter since there was no showing of an effect upon commerce.

Granger, one of respondent's servicemen, testified that Packman, respondent's secretary and treasurer,

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pursued a course of conduct which was calculated to coerce the employees to reject Local 553 in favor of Local 355. Respondent attempts to meet this testimony by arguing that Granger was biased and inconsistencies in his testimony show he was unworthy of belief. But this is a question of credibility as to which the Board is normally the sole judge.[2] Moreover, Granger's testimony is corroborated by that of Benjamin Mendolia,[3] Kershow,[4] Graziano,[5] Sammis,[6] and Joseph Mendolia.[7]

The findings on the merits are adequate and adequately supported by substantial evidence. Reimbursement is appropriate under these circumstances. The Board's order, including the provision for reimbursement, must therefore be enforced if the Board had jurisdiction over the dispute.[8]

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[2] E.g., *NLRB* v. *Morris Fishman & Sons, Inc.*, 278 F. 2d 792 (3 Cir. 1960); *NLRB* v. *Steel, Metals, Alloys and Hardware Fabricators and Warehousemen, Local 810*, 274 F. 2d 688 (2 Cir. 1960); *Paramount Cap Mfg. Co.* v. *NLRB*, 260 F. 2d 109 (8 Cir. 1958).

[3] Stenographic Transcript of Testimony, 113.

[4] *Id.* at 81–3.

[5] *Id.* at 137.

[6] The witness stated that Packman told him that "You see what's happened to the drivers, and you men haven't been hurt as yet." *Id.* at 55.

[7] 146–8.

[8] Since the Board's finding of coercion in the selection of a representative is amply supported by the evidence it is unnecessary to discuss respondent's contention that it was required to bargain with Local 355 which was found to be an employer-assisted union. *NLRB* v. *Revere Metal Art Co.*, 280 F. 2d 96, 99–100 (2 Cir. 1960). Even if the employees underwent a genuine change of attitude based upon a self-induced reappraisal they would be unable to repudiate informally the outcome of the election, at least after certification, for a reasonable period. *Ray Brooks* v. *NLRB*, 348 U.S. 96 (1954).

The Board appears to assume that any employer, whose business exceeds the Board's "jurisdictional" minimum of $500,000, who purchases materials from storage within the state the origin of which is without the state, if involved in a labor dispute necessarily affects commerce within the meaning of the Act.

The findings of the Board on effect on commerce here, perhaps because of reliance on *NLRB* v. *Pease Oil Co.*, 279 F. 2d 135 (2 Cir. 1960), are quite meager consisting of the following:

> The respondent is a New York corporation, with its principal office and place of business in Massapequa, Long Island, New York. It is engaged in the business of selling fuel oil for heating purposes, and servicing oil burners and boilers. All its customers are homeowners located in the State of New York. During the fiscal year ending June 30, 1959, the Respondent's gross sales exceeded $500,000. During the calendar year 1959 the Respondent purchased from Gulf Oil Corporation, herein called Gulf, fuel oil and related products valued at more than $500,000. Most of the product delivered to the Respondent is refined outside the State of New York and delivered into Gulf's storage tanks at New York, New York. It is then transferred to Gulf's stationary storage tanks at Oceanside, Long Island, New York, without segregation according to customers. The Respondent's trucks load oil from Gulf's Oceanside tanks, and from there deliver it either directly to the Respondent's customers, or to the Respondent's tanks at Massapequa, from which it is later withdrawn and delivered to customers. The Respondent also obtains some fuel oil by exchange with other fuel oil companies on Long Island. This operates as follows: The Respondent draws a certain amount of oil from the other firm's tanks; conversely the

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other firm draws the same amount of oil from the Respondent's tanks. It is a barter operation, without the payment of money. The Respondent has on occasions obtained truck parts directly from outside the State of New York. In 1959, these purchases totaled "a couple of hundred dollars at the most." Other than this, the Respondent made no purchases of any kind directly from outside the State.

Gulf is engaged in the nonretail and retail sale of fuel oils and related products. It operates in New York and in other States. Its gross sales and operating revenues in 1959, including consumer excise taxes, amounted to in excess of $3,170,000,000. The Respondent and the Party to the Contract concede, and I find, that at all material times Gulf was engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

These findings are based on this statement by the Law Department of Gulf:

Gulf Oil Corporation is engaged in non-retail and retail business; sales and other operating revenues (including consumer excise taxes) for 1959 according to Annual Report amounted to $3,170,847,000.

Question No. 1: What was the gross amount of sales of all items sold to Reliance Fuel Oil Corp. during a twelve-month period?

Answer: For the year 1959: $669,805.

Question No. 2: Were most of the products sold by Gulf Oil Corp. to Reliance received by Reliance from sources outside the State of New York?

Answer: At present time, most of product delivered to Reliance is refined outside state and delivered into Gulf's terminal storage within state (New York City); redelivered into local Gulf storage on Long Island (not segregated for this customer); again redelivered to cus-

tomer at or from Gulf's local Long Island storage.

The Supreme Court, however, seems never to have gone so far as to hold that mere size of a local business or amount of its purchases within the state of materials the origin of which was outside the state, without relation to other factors necessarily brings it within the Act.

In *Consolidated Edison Co.* v. *Labor Board,* 305 U.S. 197 (1938), the Court declined to place its holding on the purchases of oil, coal, etc., although very large, which came from without the state.

> [W]hether or not particular action in the conduct of intrastate enterprises does affect that commerce in such a close and intimate fashion as to be subject to federal control, is left to be determined as individual cases arise.

Black, *J.,* concurring in *Polish Alliance* v. *Labor Board,* 322 U.S. 643, 652 (1944):

> The doctrine that Congress may provide for regulation of activities not themselves interstate commerce, but merely "affecting" such commerce, rests on the premise that in certain fact situations the federal government may find that regulation of purely local and intrastate commerce is "necessary and proper" to prevent injury to interstate commerce. *Houston, E. & W. T. Ry. Co.* v. *United States,* 234 U.S. 342; *Second Employers' Liability Cases,* 223 U.S. 1, 46–47; and see *Wickard* v. *Filburn,* 317 U.S. 111, 121. In applying this doctrine to particular situations this Court properly has been cautious, and has required clear findings before subjecting local business to paramount federal regulation, *City of Yonkers* v. *United States,* 320 U.S. 685, and cases therein cited. It has insisted upon "suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of

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> state power, the justification of the exercise of the federal power must clearly appear." *Id.; Florida* v. *United States,* 282 U.S. 194, 211–212; cf. *Phelps Dodge Corp.* v. *Labor Board,* 313 U.S. 177, 196–197; *Securities & Exchange Comm'n* v. *Chenery Corp.,* 318 U.S. 80, 92–95."

The Supreme Court has stated that the Congress used the full extent of its power under the commerce clause in this legislation. *Polish Alliance* v. *Labor Board, supra,* 647. The Court has never, however, held that local regulation of labor relations in local commerce was completely superseded. At the time of enactment of the Wagner Act the Congress was not sure of the limits of its power. Since the courts had defined commerce quite broadly in the interests of employers affected by strikes of miners and stone cutters, it was felt that regulation of labor relations could be upheld in industries affecting commerce on the same basis.[9] The limits of the concept "affecting commerce" have since been defined by the Supreme Court on a case by case basis in a number of instances.[10] The federal field, in the process of definition has appeared to be steadily expanding. See Cox, Federalism in the Law of Labor Relations, 1954, 67 Harvard Law Review 1297. It may be that eventually the Congress will attempt more specifically to define the limits. As yet we cannot be certain of the extent

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[9] 79 Cong. Rec. 9682 (Rep. Connery), 74th Cong., 1st Sess. (1935). "The Supreme Court has said again and again, in the Coronado case and in the Stonecutters case that anything that affects interstate commerce, as far as a labor dispute is concerned, which burdens or obstructs interstate commerce, can be regulated under the commerce clause of the Constitution."

[10] E.g., *NLRB* v. *Jones & Laughlin Steel Co.*, 301 U.S. 1 (1937); *NLRB* v. *Fainblatt*, 306 U.S. 601 (1939); *Wickard* v. *Filburn*, 317 U.S. 111 (1942); *Howell Chevrolet* v. *NLRB*, *infra; Polish Alliance* v. *Labor Board*, *supra.*

of the exercise of federal power, but must take each case as it comes up and fit it into the framework so far constructed.

On this question the Board relies on two cases in this circuit, *NLRB* v. *Van Deusen,* 138 F. 2d 893, 895 (2 Cir. 1943), *NLRB* v. *Pease Oil Co., supra,* and on *NLRB* v. *Townsend,* 185 F. 2d 378 (9 Cir. 1950). None of these furnish very reliable support to the Board. In *Van Deusen* there was business in interstate commerce involved, or alternatively an effect on commerce by diversion of goods from interstate to intrastate business to replace production halted by the dispute. In *Pease Oil* the point as to affecting commerce was not considered. *Townsend,* an automobile retailer case, does use broad language supporting the Board's claim here. The Supreme Court, however, in *Howell Chevrolet Co.* v. *NLRB,* 346 U.S. 482 (1953), in affirming another 9th Circuit case which had cited *Townsend, NLRB* v. *Howell Chevrolet Co.,* 204 F. 2d 79 (9 Cir. 1953), relied almost wholly on the interdependence of Howell's local and General Motors' national activities due to the detailed supervision permitted by the agency agreement.

It may be that today the Court would answer in the affirmative the question it left pending in *Consolidated Edison.* In view of the caution expressed in *Howell,* and in the concurring opinion in *Polish Alliance,* however, we may be sure that a reasonably complete picture of the manner in which a work stoppage would affect commerce should be required before we rule on the jurisdictional issue. We cannot tell from the meager record before us anything about the volume of commerce in heating oils in the relevant market, Gulf's participation therein, Reliance's contract relationship, if any, with Gulf's national distribution system, Reliance's proportion of Gulf's com-

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merce in the relevant market, or the number and availability of alternate distributors to Gulf and to Reliance's customers.[11] While volume of commerce affected is not in itself material, such factual findings might well throw light upon the manner in which a stoppage at Reliance would affect commerce, if at all. We therefore decline to enforce the order at this time upon the record before us. Compare *NLRB* v. *Mid-Co. Gasoline Co.*, 172 F. 2d 974 (5 Cir. 1949), *Stauffer* v. *Exley*, 184 F. 2d 962, 967–68 (9 Cir. 1950). The case is remanded to the Board with instructions to take further evidence and make further findings on the manner in which a labor dispute at Reliance affects or tends to affect commerce.

United States Court of Appeals,
for the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirteenth day of November, one thousand nine hundred and sixty-one.

Present:

Hon. J. EDWARD LUMBARD, *Chief Judge;* Hon. HENRY J. FRIENDLY, Hon. J. JOSEPH SMITH, *Circuit Judges.*

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[11] While we are aware that alternative sources of supply do not necessarily negate a finding of jurisdiction, *Labor Board* v. *Bradford Dyeing Ass'n*, 310 U.S. 318, 326 (1940), it seems essential that the court be enlightened as to the factual relationships involved.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RELIANCE FUEL OIL CORPORATION, RESPONDENT

Petition for enforcement from the National Labor Relations Board.

This cause came to be heard on the transcript of record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that said enforcement be and it hereby is denied and that the action be and it hereby is remanded to the National Labor Relations Board with instructions to take further evidence and make further findings on the manner in which a labor dispute at Reliance affects or tends to affect commerce, in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk.

United States Court of Appeals
for the Second Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RELIANCE FUEL OIL CORPORATION, RESPONDENT

On Motion of N.L.R.B. for Rehearing

Petition for rehearing denied.

Section 2(7) of the National Labor Relations Act defines "affecting commerce" as "in commerce, or burdening or obstructing commerce or the free flow of

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commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." Therefore, if the employer is himself engaged in interstate commerce, without more the jurisdiction of the Board is established. If the employer is not engaged in interstate commerce, the acts in question must lead or tend to lead to a dispute which must burden or obstruct the free flow of interstate commerce. We believe that in enacting this double test Congress intended the courts to examine whether or not a labor dispute involving only employers not engaged in interstate commerce did or did not directly or indirectly burden or obstruct interstate commerce. Had Congress meant to give the Board jurisdiction of all labor disputes involving employers who purchased more than a *de minimis* amount of supplies which had at one time moved in interstate commerce, it would have been easy enough to say so.

The case of *Wickard* v. *Fillburn,* 317 U.S. 111 (1942), urged upon us by the Board's petition for rehearing is inapplicable here. In that case the Supreme Court was dealing with a statute which was clearly broad enough to apply to the defendant's activities, and the only question before the court was the constitutionality of that statute. In the case at bar, the constitutionality of regulating the defendant's labor dispute is clear, and we are faced with a question of statutory interpretation. In the resolution of this question, the findings called for in the opinion are required.

January 4, 1962.

United States Court of Appeals
for the Second Circuit

At a Stated Term of the United States Court of Appeals in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourth day of January, one thousand nine hundred and sixty-two.

Present: Hon. J. EDWARD LUMBARD, *Chief Judge;* Hon. HENRY J. FRIENDLY, Hon. J. JOSEPH SMITH, *Circuit Judges.*

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RELIANCE FUEL OIL CORPORATION, RESPONDENT

A petition for a rehearing having been filed herein by counsel for the petitioner,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 88

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RELIANCE FUEL OIL CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinions of the court of appeals (R. 161-170, 183-184) are reported at 297 F. 2d 94. The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 3-41) are reported at 129 NLRB 1166.

JURISDICTION

The judgment of the court of appeals remanding the case to the Board was entered on November 13,

1961 (R. 170), and on January 4, 1962 the court denied the Board's petition for rehearing (R. 185). The petition for a writ of certiorari was filed on April 4, 1962, and was granted on May 21, 1962 (R. 186), 369 U.S. 883. The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 28-31.

QUESTION PRESENTED

Whether the Board may properly conclude that the operations of an employer engaged in an otherwise local business "affect commerce" within the meaning of the National Labor Relations Act by reason of the fact that he purchases, within the State, substantial quantities of supplies from a supplier who has imported them from outside the State.

STATEMENT

A. The Board's Decision and Order

The Board found that respondent violated Section 8(a)(1), (2), (3) and (5) of the Act by, *inter alia*, according exclusive recognition to Retail Local 355[1] at a time when it was obligated to recognize Team-

[1] Amalgamated Local Union 355, Retail, Wholesale and Department Store Union, AFL-CIO.

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sters Local 553,[2] by refusing to bargain with Local 553, and by restraining and coercing its employees to abandon Local 553 and join Local 355 (R. 4-5, 35, 20-23, 24-27, 28-29, 29-31, 32-34). The Board ordered respondent to cease and desist from the unfair labor practices found, and to take appropriate affirmative action to undo the effects of its illegal conduct (R. 5-6). The only question here is whether the Board properly determined it had jurisdiction over respondent's operations (R. 10-12). The underlying facts on this issue are as follows:

Respondent Reliance is a New York corporation with its principal office and place of business in Massapequa, Long Island, New York (R. 10). It is engaged in the business of selling fuel oil for heating purposes, and servicing oil burners and boilers (*ibid.*). Reliance has about 8,000 customers, all of whom are homeowners residing in the State of New York (R. 10, 159). During the fiscal year ending June 30, 1959, respondent delivered approximately 6,750,000 gallons of fuel oil to its customers, amounting to gross sales in excess of $500,000 (R. 10, 82-83). During the calendar year 1959, Reliance purchased from the Gulf Oil Corporation fuel oil and related products valued at more than $650,000 (R. 10, 45-46, 115). Gulf Oil Corporation, which is engaged in the retail and non-retail sale of fuel oil and related products, operates in New York and other States, and is

[2] Coal, Gasoline, Fuel Oil Teamsters, Chauffeurs, Oil-Burner Installation, Maintenance Servicemen and Helpers, Local Union 553, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

concededly engaged in interstate commerce (R. 10-11, 114, 115-116). Gulf's gross sales and operating revenues in 1959, including consumer excise taxes, exceeded $3,170,000,000 (*ibid.*).

Most of the products sold and delivered to Reliance by Gulf are refined by the latter outside New York State, delivered into Gulf's storage tanks at New York City, and then transferred to Gulf's stationary storage tanks at Oceanside, Long Island, without segregation according to customers (*ibid.*). Respondent's trucks load oil from Gulf's Oceanside tanks, and from there deliver it either directly to Reliance's customers or to Reliance's tanks at Massapequa, from which it is later withdrawn and trucked to the consumers (R. 10, 85-86, 152-153). The consumers pay respondent for the oil by either giving the money to the driver at the time of delivery, or making their remittance by mail shortly thereafter (R. 154-155).

On the basis of these facts,[3] the Board found that respondent's operations affected interstate commerce within the meaning of the Act (R. 12), and that respondent's unfair labor practices "tend to lead to labor disputes burdening and obstructing commerce within the meaning of Section 2(6) and (7) of the Act" (R. 35-36).[4]

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[3] The record also showed that in 1959, Reliance purchased a few hundred dollars worth of truck parts in New Jersey (R. 152). In asserting jurisdiction, however, the Board did not rely on these transactions.

[4] Viewing respondent as a "retail concern" and finding its gross sales in excess of $500,000 per year, the Board concluded that its discretionary standards for the exercise of jurisdiction were satisfied (R. 11). See note 14, *infra*, pp. 22-23.

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B. The Decision of the Court of Appeals

The court below was satisfied that the Board's findings on the merits were "adequate and adequately supported by substantial evidence," and concluded that the Board's order should be enforced in full "if the Board had jurisdiction over the dispute" (R. 165). However, the court thought the evidence in the record insufficient to sustain jurisdiction and remanded the case to the Board "to take further evidence and make further findings on the manner in which a labor dispute at Reliance affects or tends to affect commerce" (R. 170).

Noting that in *Edison Co.* v. *Labor Board*, 305 U.S. 197, and *Howell Chev. Co.* v. *Labor Board*, 346 U.S. 482 (discussed *infra*), the jurisdictional determination was not predicated on substantial intrastate purchases of products which originated outside the State, the court below expressed doubt as to whether that fact alone would be sufficient to permit Congress to regulate a local business (R. 167, 169). Accordingly, it concluded that (R. 169), "a reasonably complete picture of the manner in which a work stoppage would affect commerce should be required before we rule on the jurisdictional issue." Explaining the remand, the court stated (R. 169):

> We cannot tell from the meager record before us anything about the volume of commerce in heating oils in the relevant market, Gulf's participation therein, Reliance's contract relationship, if any, with Gulf's national distribution system, Reliance's proportion of Gulf's commerce in the relevant market, or the number and availability of

alternate distributors to Gulf and to Reliance's customers.[11] While volume of commerce affected is not in itself material, such factual findings might well throw light upon the manner in which a stoppage at Reliance would affect commerce, if at all.

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[11] While we are aware that alternative sources of supply do not necessarily negate a finding of jurisdiction, *Labor Board* v. *Bradford Dyeing Ass'n*, 310 U.S. 318, 326 (1940), it seems essential that the court be enlightened as to the factual relationships involved.

The Board's petition for rehearing (R. 173-183) was denied in a supplemental opinion (R. 183-184) holding that it was "clear" that Congress could constitutionally regulate the labor dispute in question, and that the problem presented was only one of statutory interpretation (R. 184). After construing the definition of "affecting commerce" in Section 2(7) of the Act, the court concluded (*ibid.*):

> [I]f the employer is himself engaged in interstate commerce, without more the jurisdiction of the Board is established. If the employer is not engaged in interstate commerce, the acts in question must lead or tend to lead to a dispute which must burden or obstruct the free flow of interstate commerce. We believe that in enacting this double test Congress intended the courts to examine whether or not a labor dispute involving only employers not engaged in interstate commerce did or did not directly or indirectly burden or obstruct interstate commerce. Had Congress meant to give the Board jurisdiction of all labor disputes involving employers who purchased more than a *de minimis* amount of supplies which had

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at one time moved in interstate commerce, it would have been easy enough to say so.

SUMMARY OF ARGUMENT

The court of appeals held, in both its initial opinion and its opinion denying the Board's petition for rehearing, that a local business may not be deemed to affect commerce within the meaning of Section 2(7) of the Act merely because it purchases substantial quantities of supplies which originated outside the State. This holding is erroneous and contrary to settled principles.

1. The ultimate holding below, that, while respondent's business is amenable to regulation by Congress under the commerce power, it is not subject to the Board's jurisdiction, is a contradiction. For this Court has consistently held that in the National Labor Relations Act "Congress meant to reach to the full extent of its power under the Commerce Clause." *Guss* v. *Utah Labor Board*, 353 U.S. 1, 3. And, as the court below apparently agreed, there is no doubt that Congress' constitutional power extends to a business which affects commerce only by reason of purchasing substantial quantities of supplies that originate out-of-state. The full sweep of Congress' power under the Commerce Clause is not limited to operations that are "in commerce," but extends to local and intrastate activities which, "even if [they] be local and though [they] may not be regarded as commerce * * * [exert] a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined

as 'direct' or 'indirect.'" *Wickard* v. *Filburn*, 317 U.S. 111, 125.

Applying that test here, the Board's statutory jurisdiction over respondent is established, without more, by the fact that, during the year preceding the unfair labor practices, it purchased in excess of $650,000 worth of fuel oil from Gulf, most of which the latter concededly obtained from outside the State. A shutdown of respondent's plant due to a labor dispute would cause it to discontinue purchasing that amount of oil from Gulf, and this, in turn, would force Gulf to curtail, or at least delay, further shipments of oil into the State. The result is obviously a "substantial economic effect on interstate commerce."

2. In any event, the breadth of the Commerce Clause to one side, it is clear the Act grants the Board jurisdiction over intrastate businesses whose source of supply is out of state. Section 2(7) of the Act does not require proof that an unfair labor practice affecting such a business will actually "burden" or "obstruct" interstate commerce. The legislative findings incorporated in Section 1 establish a conclusive presumption that the activities prohibited will impede the free flow of commerce. If the business affected by the unfair labor practice has a substantial connection to interstate commerce, as here, the injurious result will be assumed, without considering all possibly mitigating factors.

The tie with commerce may be established by indirect, as well as direct, imports from out of state. Nor does the relative volume of the commerce affected in the particular case matter, or the availability of

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other markets for the goods imported. Congress so indicated in Section 14(c) of the Act which approves jurisdictional standards stated in terms of absolute figures of direct or indirect imports or exports interstate. So long as it is not *de minimis*, potential injury to any fraction of the total commerce in the commodities involved is sufficient. Here the volume of out-of-state imports, gauged in absolute terms, is clearly sufficient to justify the Board's exercise of jurisdiction.

ARGUMENT

The Operations of an Employer Engaged in an Otherwise Local Business "Affect Commerce" Within the Meaning of the National Labor Relations Act if He Purchases, Within His State, Substantial Quantities of Merchandise From a Supplier Who Had Imported Them From Outside the State

Section 10(a) of the National Labor Relations Act gives the Board power "to prevent any person from engaging in any unfair labor practice * * * affecting commerce." The phrase "affecting commerce" is defined in Section 2(7) to mean "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." And "commerce," of course, includes interstate or foreign "trade, traffic, commerce, transportation, or communication." Section 2(6). The court of appeals, in both its opinions, held that a local business may not be deemed to affect commerce within the meaning of the Act merely by virtue of the fact that it purchases substantial quantities of supplies which originated outside the State.

In its initial opinion, the court was apparently of the view that Congress lacked constitutional power to regulate a business whose impact on interstate commerce rests on nothing more than such purchases. In its supplemental opinion filed on the denial of rehearing, the court recognized that Congress had constitutional power to do so, but concluded that the Act did not give the Board all the power which Congress could constitutionally confer under the Commerce Clause. As it interpreted the Act (R. 184):

> * * * Congress intended the courts to examine whether or not a labor dispute involving only employers not engaged in interstate commerce did or did not directly or indirectly burden or obstruct interstate commerce. Had Congress meant to give the Board jurisdiction of all labor disputes involving employers who purchased more than a *de minimis* amount of supplies which had at one time moved in interstate commerce, it would have been easy enough to say so.

Finding the evidence insufficient to show how a work stoppage involving respondent would "burden" or "obstruct" commerce, the court remanded the case for further evidence and additional findings.

In short, the court held that, in order to assume jurisdiction under the Act, the Board must find that the particular labor dispute involved, unless arrested, will have an actual impact on commerce and that the purchase of substantial supplies originating outside the State is not, in itself, enough to show such an impact. This holding is plainly inconsistent with controlling decisions of this Court, with decisions of the courts of appeals, and with the provisions of Section 14(c)(1) of the Act.

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A. ***The jurisdictional coverage of the Act is coextensive with Congress' constitutional power to regulate commerce, and that power would reach the business here.***

It is well settled that the Board's legal jurisdiction is as broad as Congress could constitutionally confer. As this Court stated in *Guss* v. *Utah Labor Board*, 353 U.S. 1, 3:

> Since it was first enacted in 1935, the National Labor Relations Act has empowered the National Labor Relations Board "to prevent any person from engaging in any unfair labor practice . . . [defined by the Act] affecting commerce." By this language and by the definition of "affecting commerce" elsewhere in the Act, Congress meant to reach to the full extent of its power under the Commerce Clause. [Footnotes omitted.]

Accord: *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383, 391; *Polish Alliance* v. *Labor Board*, 322 U.S. 643, 647-648; *Labor Board* v. *Fainblatt*, 306 U.S. 601, 606-607; *Labor Board* v. *Jones & Laughlin*, 301 U.S. 1, 31. Hence, the court below was clearly in error when it held that, although Congress could constitutionally regulate a local business which affects commerce only by reason of purchasing substantial quantities of supplies that originate out-of-state, it did not go so far in the Act.

Nor can it be doubted, as the court below ultimately conceded, that Congress' constitutional power extends to a business having only such an "indirect" connection with interstate commerce. It is well settled that the full sweep of Congress' power under the Commerce Clause is not limited to operations that are in

commerce. "* * * [e]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" *Wickard* v. *Filburn*, 317 U.S. 111, 125. "The commerce power * * * extends to those activities intrastate which so affect interstate commerce * * * as to make regulation of them appropriate means to the attainment of * * * the effective execution of the granted power to regulate interstate commerce." *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 119. "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States* v. *Women's Sportswear Ass'n*, 336 U.S. 460, 464.[5]

Thus, in *Wickard*, the Court sustained application of the production quotas of the Agricultural Adjustment Act to 239 bushels of wheat grown by a farmer purely for his own consumption, because Congress had found that the price of wheat was affected by the total supply and not merely the quantity offered for sale. In *Wrightwood Dairy*, it was held that the price controls of the Agricultural Marketing Act could properly be applied to milk which was produced and consumed wholly within the state, since it had an impact

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[5] See generally, Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 Harv. L. Rev. 645, 883 (1946).

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upon the price of milk sold in interstate commerce. And, in *United States* v. *Sullivan*, 332 U.S. 689, 697-698, the labeling requirements of the Food and Drug Act were held applicable to drugs which had been misbranded by a retail druggist after he had purchased them from a wholesaler within the state, the wholesaler having originally obtained them from out-of-state.

Under these principles it is clear that Reliance's substantial purchases of out-of-state fuel brings it within the scope of the Commerce Clause. This much the court of appeals concedes in its opinion on rehearing. It should follow that the Board had jurisdiction in this case. But, though it expressly acknowledged the rule in its first opinion, the court below now refuses to recognize that the constitutional limits of Congressional power and the jurisdiction of the National Labor Relations Board are co-extensive. Accordingly, we pursue the question, perhaps unnecessarily, without reference to the Commerce Clause, looking only to the provisions of the Act which define the scope of the Board's authority and the cases decided under it.

B. *Whether or not Congress exhausted its constitutional power to regulate commerce, the Act grants the Board jurisdiction over the unfair labor practices involved here.*

1. The conclusion of the court below, that the Board's jurisdiction over respondent could not be predicated merely on a showing that it purchased substantial quantities of oil which originated out-of-

state, appears to rest, in part at least, on the premise that the definition of "affecting commerce" in Section 2(7) established a "double test" for determining Board jurisdiction. The court pointed out (R. 183-184) that "affecting commerce" is defined as "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." From this, it concluded (*ibid.*):

> Therefore, if the employer is himself engaged in interstate commerce, without more the jurisdiction of the Board is established. If the employer is not engaged in interstate commerce, the acts in question must lead or tend to lead to a dispute which must burden or obstruct the free flow of interstate commerce. We believe that in enacting this double test Congress intended the courts to examine whether or not a labor dispute involving only employers not engaged in interstate commerce did or did not *directly or indirectly* burden or obstruct interstate commerce [emphasis added].

We submit the court read too much into the definition. There is no basis for assuming that Congress was here drawing a fine line between unfair labor practices involving interstate businesses and those involving intrastate businesses. Clearly, every unfair labor practice, wherever occurring, which, directly or indirectly, interferes with the free flow of commerce between the States is subject to the Act. Of course, the effect on commerce may be more or less immedi-

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ate, and it may be more or less obvious.[6] But Congress did not distinguish between unfair labor practices which are *per se* burdens on commerce, because they occur in an industry directly involved in interstate commerce, and unfair labor practices in other businesses, the adverse effect of which must be established by a particular quantum of proof. On the contrary, as this Court has recognized, *supra*, pp. 11-13, the statutory definition of "affecting commerce" was intended to go as far as Congress could to prevent undue obstruction of commerce.

2. Starting from the erroneous premise that, because Reliance is not itself directly involved in inter-

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[6] Accordingly, every case must be judged on its own facts, as this Court said in *Edison Co.* v. *Labor Board*, 305 U.S. 197. Nothing more can be made of the passage relied on by the court below (R. 167). Nor is Mr. Justice Black's concurring opinion in *Polish Alliance* v. *Labor Board*, 322 U.S. 643, 652, dispositive of the question. Certainly, "clear findings" are required when the limits of constitutional power are reached. But the issue here is whether those findings need include matters which this Court has said are irrelevant. Mr. Justice Black, in the passage quoted (R. 167-168), was merely criticizing the majority of the Court for affirming the Board's decision on grounds which the Board had not considered. The Board had found—and Mr. Justice Black agreed—that it had jurisdiction over the employer because the insurance company "was itself 'engaged in commerce.'" 322 U.S. at 651. The majority opinion, written by Mr. Justice Frankfurter, held that the Board had jurisdiction because the employer's "insurance activities merely affected commerce in types of interstate business other than its own." *Ibid.* The concurring opinion observed that "[o]n this fact issue [the Board] made no finding at all." *Ibid.* Cf. *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533, decided the same day as *Polish Alliance*.

state commerce the situation warranted special scrutiny, the court of appeals required further proof of the injurious effect of the work stoppage here. It was not satisfied with the conceded fact that a substantial portion of respondent's supplies originate out-of-state. It wanted to know exactly what impact a labor dispute involving Reliance would have on these interstate transactions. In short, the court below required proof of *actual*[7] injury to interstate commerce. In this, it was clearly wrong.

Indeed, in Section 1 of the Act, 29 U.S.C. 151, Congress itself made the finding that labor disputes in industries tied to interstate commerce have "the necessary effect of burdening or obstructing [interstate] commerce." And there has been no retreat from that position. On the contrary, in 1959 Congress added Section 14(c)(1) (*infra*, p. 31), which expressly approves the Board's prevailing practice of testing jurisdiction without inquiring about the actual effect of the labor dispute on interstate commerce.[8] Plainly, Congress here reiterated its finding that labor troubles occur-

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[7] We do not mean to suggest that the court of appeals thought the injury must have already occurred. Such a holding would of course defeat the preventive purpose of the Act. See *Labor Board* v. *Bradford Dyeing Assn.*, 310 U.S. 318, 326; *Edison Co.* v. *Labor Board*, 305 U.S. 197, 222. But the court did require proof that obstruction of interstate commerce would actually result. It refused to indulge the presumption that injury was likely.

[8] The proviso to § 14(c)(1) enjoins the Board from "declin[ing] to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959."

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ring in any enterprise of more than minimal size with some out-of-state connection do adversely affect interstate commerce. That assumption need not be reexamined. The deleterious effect of unfair labor practices is conclusively presumed.[9] The only inquiry open is whether the tie between the business involved and commerce is sufficiently close to bring that presumption into play.

3. An intrastate business may, of course, have such ties with interstate commerce as to fall within the purview of the Act. See, *e.g.*, *Edison Co.* v. *Labor Board, supra*; *Labor Board* v. *Fainblatt, supra*, 604-605; *Bus Employees* v. *Wisconsin Board, supra*, at 391-392. The only question here is whether obtaining supplies from out of the State is a sufficient connection.

The opinion below notes that in *Edison Co.* v. *Labor Board, supra*, at 220, this Court "laid to one side" evidence of very large out-of-state purchases in arriving at the conclusion that certain New York utilities were subject to the Act. But all this proves is that other facts in the case made it unnecessary for the

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[9] See *National Labor Relations Board* v. *Phoenix Mutual Life Insurance Co.*, 167 F. 2d 983, 985 (C.A. 7), certiorari denied, 335 U.S. 845; *National Labor Relations Board* v. *Tex-O-Kan Flour Mills Co.*, 122 F. 2d 433, 436-437 (C.A. 5); *National Labor Relations Board* v. *Suburban Lumber Co.*, 121 F. 2d 829, 831-833 (C.A. 3), certiorari denied, 314 U.S. 693; *National Labor Relations Board* v. *Alloy Cast Steel Co.*, 117 F. 2d 302, 303-304 (C.A. 6); *Southern Colorado Power Co.* v. *National Labor Relations Board*, 111 F. 2d 539, 543 (C.A. 10); *National Labor Relations Board* v. *American Potash & Chemical Corp.*, 98 F. 2d 488, 495 (C.A. 9), certiorari denied, 306 U.S. 643.

Court to decide the present issue. Similarly, in *Howell Chev. Co.* v. *Labor Board*, 346 U.S. 482, the Court did not base its holding solely on substantial out-of-state purchases, because it was unnecessary to do so. We note, however, that these transactions were not said to be irrelevant in either case, and that in *Howell* the Court did not put them "to one side." But, in any event, three other decisions of this Court resolve the issue. They are *Labor Board* v. *Denver Bldg. Council*, 341 U.S. 675; *Meat Cutters* v. *Fairlawn Meats*, 353 U.S. 20; and *San Diego Unions* v. *Garmon*, 353 U.S. 26.

The first case involved an electrical subcontractor who performed all of his services in one State but obtained most of his materials elsewhere. The Court also noted that the subcontractor's firm shipped some of its products out of the State, but the holding that the activities there complained of affected interstate commerce seems to be based almost wholly on the supposition that the unfair labor practices charged "might well result in substantially decreasing the influx of materials into Colorado from outside the State." *Labor Board* v. *Denver Bldg. Council, supra*, at 684. This reading is confirmed by the more recent *Meat Cutters* and *Garmon* cases, where the only ties with interstate commerce were through purchases, there being no out-state sales. In *Meat Cutters, supra*, at 22, the jurisdictional facts were summarized as follows:

> Respondent operates three meat markets in the vicinity of Akron, Ohio. All of its sales are intrastate, but of its purchases in one year total-

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> ing not quite $900,000, slightly more than $100,000 worth came from outside Ohio directly and as much or more indirectly.

And, in the companion *Garmon* case, Board jurisdiction was predicated solely on the employer's purchase of "more than $250,000 worth of material from outside of California for resale at retail" (353 U.S. at 27).

4. Two of the cases just discussed also dispose of another question. It is unimportant whether, as here, the purchase of out-of-state supplies was consummated in the State, or at the place of origin. Indeed, in both *Denver Building Council* and *Meat Cutters* the Court noted that a part of the business' purchases came "directly" from another State, while another part came in only "indirectly" from outside the State, but it treated both as equally significant in establishing the necessary connection with interstate commerce. And with good reason, for, obviously, the effect of an interruption in the flow of commerce is no less acute because there is a middle-man who also suffers the "pinch."

This is no new doctrine. Since the early days of the Act, it has been held that "[t]he fact that the company, instead of itself buying all its supplies outside the state and shipping them in * * * has some arrangement whereby someone else ships them in and then it buys them from the shipper after they come into the state, does not destroy the effect of the transactions on interstate commerce." *National Labor Board* v. *Sunshine Mining Co.*, 110 F. 2d 780,

784 (C.A. 9), certiorari denied, 312 U.S. 678.[10] As this Court observed in *Santa Cruz Co.* v. *Labor Board*, 303 U.S. 453, 463:

> A large part of the interstate commerce of the country is conducted upon that basis and the arrangements that are made between seller and purchaser with respect to the place of taking title to the commodity * * * where the actual movement is interstate, do not affect either the power of Congress or the jurisdiction of the agencies which Congress has established.

Accordingly, it makes no difference, for purposes of the Act, that the imported fuel oil was obtained by respondent from Gulf's storage tanks in Oceanside, New York, rather than directly from outside the State via railroad or ship; the potential effect of a labor dispute at respondent's plant on Gulf's interstate operations would be the same. See also, *United States* v. *Employing Plasterers Ass'n*, 347 U.S. 186; *Standard Oil Co.* v. *Federal Trade Commission*, 340

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[10] Accord: *National Labor Relations Board* v. *Local 1976, Carpenters*, 241 F. 2d 147, 152 (C.A. 9), affirmed, 357 U.S. 93; *National Labor Relations Board* v. *Vulcan Forging Co.*, 188 F. 2d 927, 930 (C.A. 6); *National Labor Relations Board* v. *Townsend*, 185 F. 2d 378, 382-383 (C.A. 9), certiorari denied, 341 U.S. 909; *National Labor Relations Board* v. *Cowell Portland Cement Co.*, 148 F. 2d 237, 242 (C.A. 9), certiorari denied, 326 U.S. 735; *National Labor Relations Board* v. *Edinburg Citrus Ass'n*, 147 F. 2d 353, 354 (C.A. 5); *National Labor Relations Board* v. *Van Deusen*, 138 F. 2d 893, 895 (C.A. 2); *National Labor Relations Board* v. *Suburban Lumber Co.*, 121 F. 2d 829, 833 (C.A. 3), certiorari denied, 314 U.S. 693.

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U.S. 231, 237-238;[11] *United States* v. *Sullivan, supra.*

5. Nor is it important whether the purchases made directly or indirectly from out of the State are relatively large or small in terms of the total volume of commerce in the commodity. That principle was established long ago. In *Labor Board* v. *Fainblatt, supra,* at 607, this Court said:

> Examining the Act in the light of its purpose and of the circumstances in which it must be applied we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected more than that to which courts would apply the maxim *de minimis.*

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[11] The situation in *Standard Oil* is close to that here. Standard brought out-of-state gasoline to its terminal at River Rouge, Michigan, where it was stored for varying periods and then sold pursuant to individual orders to independent customers in Detroit. 340 U.S. at 236-237. "'Although the gasoline was not brought to River Rouge pursuant to orders already taken, the demands of the Michigan territory were fairly constant, and [Standard's] customers' demands could be accurately estimated, so the flow of the stream of commerce kept surging from [Standard's out-of-state refining plant] to Detroit.'" *Id.*, at 237. The Court concluded that the sales by Standard to its customers were "made in interstate commerce," within the meaning of the Robinson-Patman Act, notwithstanding the "temporary storage of the gasoline * * * within the Detroit area," expressly noting that the sales were "those of an interstate producer and refiner to a local distributor." *Id.*, at 238, n. 6. It would seem to follow, *a fortiori*, that such sales, which are the equivalent of Gulf's sales to respondent here, would satisfy the less stringent "affecting commerce" test of the National Labor Relations Act.

And the principle has been consistently followed. See *Labor Board* v. *Bradford Dying Assn.*, *supra*, at 326; *Labor Board* v. *Denver Bldg. Council*, *supra*, at 684; *Meat Cutters* v. *Fairlawn Meats*, *supra*, at 22-23.

Moreover, a fully informed [12] Congress itself recently approved jurisdictional standards which make relative percentages irrelevant. Section 14(c) of the Act (*infra*, p. 31), added in 1959 to eliminate the "no man's land," [13] expressly recognizes the limits of the Board's discretionary jurisdiction in absolute, not relative, terms. Indeed, for some categories of employers, the amendment in effect prohibits the Board to decline jurisdiction if the business has "an outflow or inflow across State lines of at least $50,000, whether such outflow or inflow be regarded as direct or indirect." See *Siemons Mailing Service*, 122 NLRB 81, 85.[14]

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[12] It is clear Congress was fully aware of the Board's "standards prevailing upon August 1, 1959." See II *Legislative History of the Labor-Management Reporting and Disclosure Act, 1959* (G.P.O., 1959) 1153(3)-1154(3), 1720(3); 105 Cong. Rec. 6548-6549, 18134.

[13] See II *Legislative History of the Labor-Management Reporting and Disclosure Act, 1959* (G.P.O., 1959), 1434(3)-1435(3), 1712; 105 Cong. Rec. 17901-17902, 18022. See also Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 Minn. L. Rev. 257, 261-262 (1959).

[14] While the quoted standard applies only to "nonretail" businesses, "instrumentalities, links, and channels of interstate commerce," and "public utilities" (as an alternate standard), see *Twenty-Third Annual Report*, National Labor Relations Board (G.P.O., 1959), p. 8, we suggest it serves also as a safe measure of the connection with interstate com-

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It follows, therefore, that "the [total] volume of commerce in heating oils in the relevant market" and "[the extent] of Gulf's participation therein" (R. 169), are not material considerations in determining the Board's jurisdiction.[15]

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merce for "retail concerns." If the Board takes jurisdiction of a case involving a "nonretail" employer merely because there is an "inflow" or "outflow" exceeding $50,000 per year, there is more reason for doing so when the employer in another class meets his own "standard" *and* imports or exports, directly or indirectly, more than $50,000 annually. (In the instant case, without rejecting the contention that Reliance was in the "nonretail" class, the Board apparently treated respondent as a retailer, subject to the $500,000 annual gross volume of business standard.)

[15] The immateriality of the additional commerce data sought by the court below in its remand of this case is shown by the history of *National Labor Relations Board* v. *Mid-Co Gasoline Co.*, 172 F. 2d 974 (C.A. 5), remanding 78 NLRB 740; 183 F. 2d 451 (C.A. 5), enforcing the Board's supplemental decision and order, 86 NLRB 448. When the case first came before the Fifth Circuit on the Board's petition for enforcement, the court, with Judge Hutcheson dissenting, remanded the case to the Board for additional information similar to that sought here. The Board accepted the remand and made the additional findings requested. In its supplemental conclusions, however, the Board pointed out that, regardless of the facts thus revealed, jurisdiction nonetheless existed under the principles established by this Court. When the case came again before the Fifth Circuit, that court, in an opinion by Judge Hutcheson, enforced the Board's order without reference to the detailed supplemental findings and quoted with approval the Board's conclusion that the additional data was immaterial.

6. Likewise irrelevant is "the number and availability of alternate distributors to Gulf and to Reliance's customers." (R. 169). The fact that substitute facilities may be available to fill the void created by a shutdown of the immediate employer's business does not deprive the Board of jurisdiction. *Labor Board* v. *Bradford Dyeing Assn., supra.*[16]

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[16] In its decision, the court below cited *Bradford Dyeing* for the proposition that "alternative sources of supply *do not necessarily* negate a finding of jurisdiction" (R. 169, n. 11, emphasis added). This Court, however, in holding that such factor was "not material," ruled it out altogether as a consideration. *Bradford Dyeing* has consistently been so interpreted by the courts of appeals. See, *National Labor Relations Board* v. *El Dorado Water Co., Inc.*, 195 F. 2d 950, 952 (C.A. 8); *National Labor Relations Board* v. *Davis Motors, Inc.*, 192 F. 2d 782-783 (C.A. 10); *National Labor Relations Board* v. *Townsend*, 185 F. 2d 378, 382 (C.A. 9), certiorari denied, 341 U.S. 909; *National Labor Relations Board* v. *Mid-Co Gasoline Co.*, 183 F. 2d 451, 452, 453 (C.A. 5); *J. L. Brandeis & Sons* v. *National Labor Relations Board*, 142 F. 2d 977, 980 (C.A. 8), certiorari denied, 323 U.S. 751; *National Labor Relations Board* v. *Bank of America*, 130 F. 2d 624, 626 (C.A. 9), certiorari denied, 318 U.S. 791, 792; *National Labor Relations Board* v. *Western Mass. Elec. Co.*, 120 F. 2d 455, 457 (C.A. 1); *Pueblo Gas & Fuel Co.* v. *National Labor Relations Board*, 118 F. 2d 304, 306 (C.A. 10); *Cudahy Packing Co.* v. *National Labor Relations Board*, 118 F. 2d 295, 299 (C.A. 10); *National Labor Relations Board* v. *Henry Levaur, Inc.*, 115 F. 2d 105, 109 (C.A. 1), certiorari denied, 312 U.S. 682; *Consumers Power Co.* v. *National Labor Relations Board*, 113 F. 2d 38, 40-41 (C.A. 6); Accord: *Virginian Ry Co.* v. *System Federation No. 40*, 300 U.S. 515, 557. But cf. *National Labor Relations Board* v. *Benevento*, 297 F. 2d 873, 875-876 (C.A. 1).

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7. The court below seems to suggest that the volume of respondent's out-of-state imports is, in absolute terms, *de minimis*, and therefore insufficient to justify the conclusion that interstate commerce will be affected by a disruption of its business activities. The short answer to this suggestion is that the almost $650,000 in out-of-state purchases here involved is many times the Board's jurisdictional floor of $50,000 [17] and well above the imports of $200,000 and $250,000 found sufficient in *Meat Cutters* and *Garmon*, respectively. Moreover, "[w]hether or no practices may be deemed by Congress to affect interstate commerce is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board. Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce." *Polish Alliance* v. *Labor Board*, *supra*, at 648.

The Board's statutory jurisdiction over respondent is established, without more, by the fact that, during the year preceding the unfair labor practices, it purchased in excess of $650,000 worth of fuel oil from Gulf, most of which the latter concededly obtained from outside the state. For a shutdown of respondent's operations due to a labor dispute would cause it to discontinue purchasing that amount of oil from Gulf, and, likely, this, in turn, would force Gulf to

[17] See note 14, *supra*.

curtail, or at least delay, further shipments of oil into the State. The potential obstruction to $650,000 worth of out-of-state oil shipments is well above *de minimis*, even without considering the additional danger that a labor dispute involving respondent may, if unchecked, spread to other fuel oil dealers in the country.[18]

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[18] In 1958, the latest year for which figures are available, there were 10,248 independent fuel oil dealers in the nation with total gross sales of $1,770,992,000. For the workweek ending nearest November 15, 1958, these dealers employed 43,401 men, with a payroll of $3,286,439. The total annual payroll during 1958 was $176,280,000. U. S. Department of Commerce, Bureau of the Census, *1958 Census of Business: Retail Trade, United States Summary* (G.P.O. 1961), Table 2, pp. 1-8. The National Fueloil Council, in its pamphlet, *Facts About Fueloil and Home Heating* (1959/60), states (p. 9) that, in 1958, 16,028,284 homes in this country were heated by oil, and new oil-burner installations for central heating were being made at the rate of 600,000 per year. The Council further states (p. 17) that independent fuel oil dealers account for 56 percent of the total volume of fuel oil sold to homes.

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CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed and the case remanded with directions to enter a decree enforcing the Board's order.

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AUGUST 1962.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 541, 29 U.S.C. 151, *et seq.*) are as follows:

> Section 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.
>
> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contact, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

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Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Sec. 2. When used in this Act—

* * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * *

Sec. 10.(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision

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of this Act or has received a construction inconsistent therewith.

* * * *

Sec. 14. (c) (1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

(c) (2) Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

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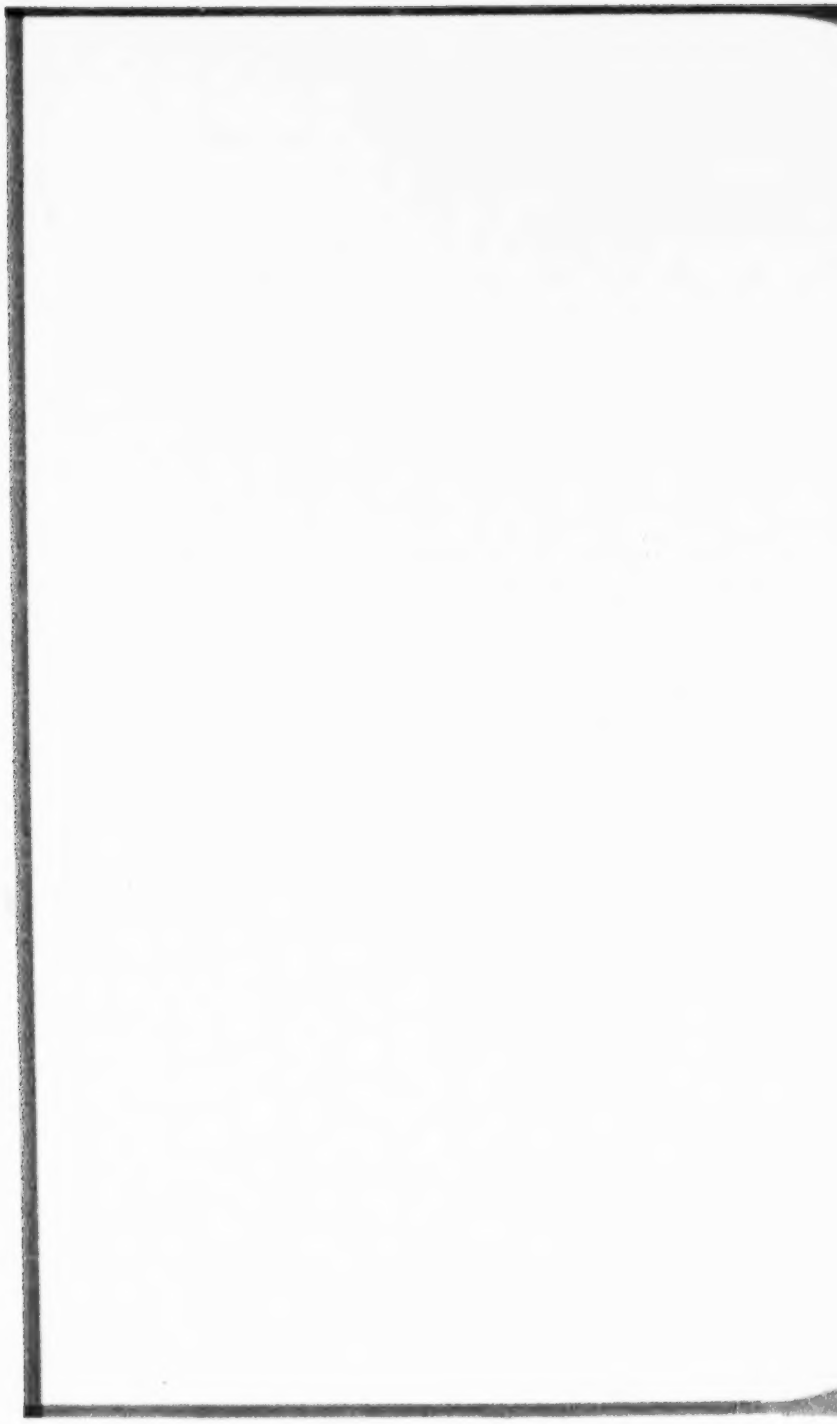

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JOHN F. DAVIS, CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 88

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

RELIANCE FUEL OIL CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RELIANCE FUEL OIL CORPORATION

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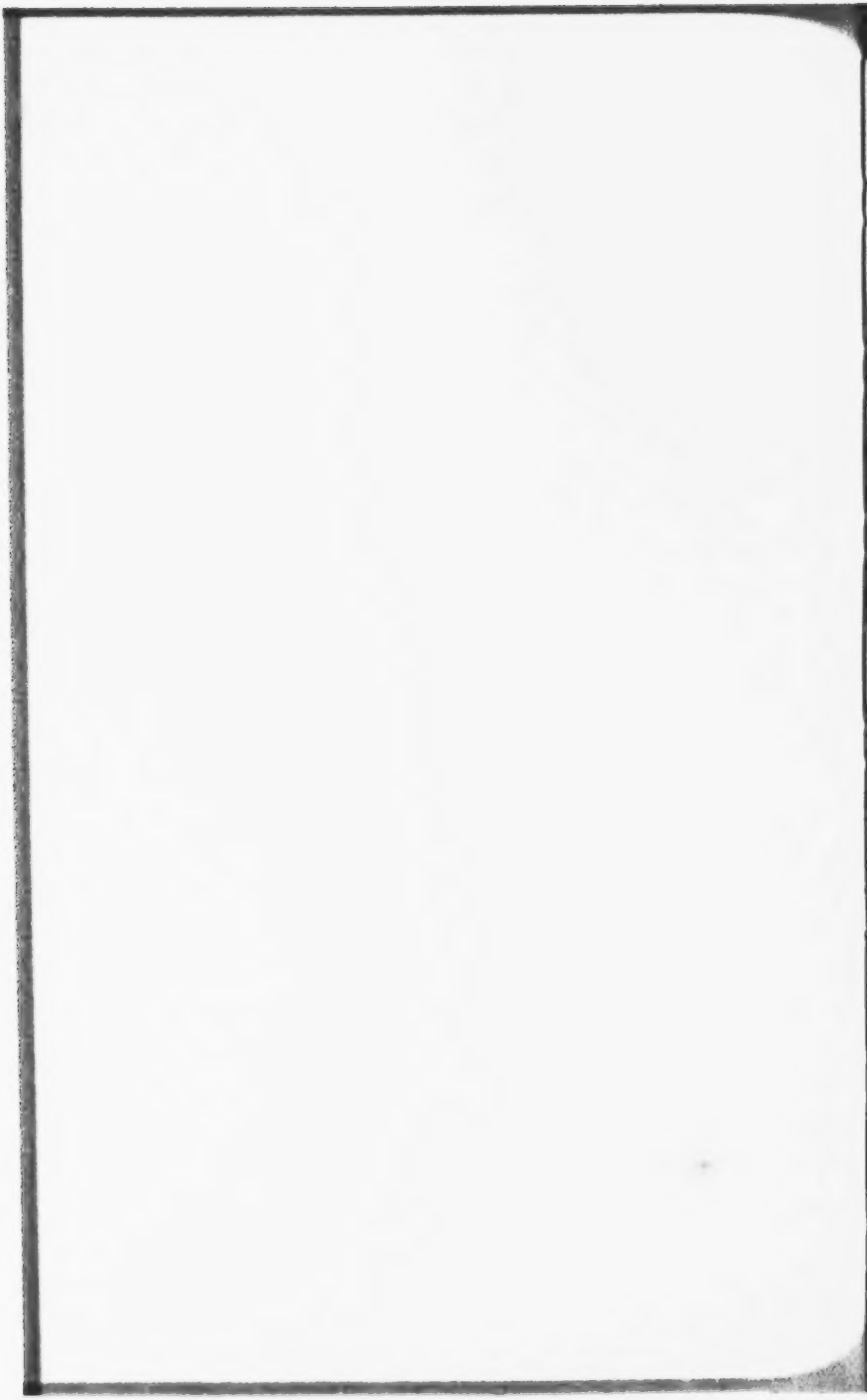

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 88

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

RELIANCE FUEL OIL CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RELIANCE FUEL OIL CORPORATION

Question Presented

Whether the National Labor Relations Board, hereinafter referred to as the Board, may by establishing a dollar volume of business done by a local business concern assume jurisdiction within the meaning of the National Labor Relations Act, notwithstanding the fact that the purchases by the local business concern were from a supplier who has imported them from outside the State.

Statement

Respondent, Reliance, is a New York corporation with its principal office and place of business in Massapequa, Long Island, New York (R. 10). It is

engaged in the business of selling fuel oil for heating purposes, and servicing oil burners and boilers (ibid.). Reliance has about 8,000 customers, all of whom are homeowners residing in the State of New York (R. 10, 159). During the fiscal year ending June 30, 1959, respondent delivered approximately 6,750,000 gallons of fuel oil to its customers, amounting to gross sales in excess of $500,000 (R. 10, 82-83). During the calendar year 1959, Reliance purchased from the Gulf Oil Corporation fuel oil and related products valued at more than $650,000 (R. 10, 45-46, 115). Gulf Oil Corporation, which is engaged in the retail and non-retail sale of fuel oil and related products, operates in New York and other States, and is concededly engaged in interstate commerce (R. 10-11, 114, 115-116). Gulf's gross sales and operating revenues in 1959, including consumer excise taxes, exceeded $3,170,000,000 (ibid.).

Most of the products sold and delivered to respondent, Reliance, by Gulf are refined by the latter outside New York State, delivered into Gulf's storage tanks at New York City, and then transferred to Gulf's stationary storage tanks at Oceanside, Long Island, without segregation according to customers (ibid.). Respondent's trucks load oil from Gulf's Oceanside tanks, and from there deliver it either directly to Reliance's customers or to Reliance's tanks at Massapequa, from which it is later withdrawn and trucked to the consumers (R. 10, 85-86, 152-153). The consumers pay respondent for the oil by either giving the money to the driver at the time of delivery, or making their remittance by mail shortly thereafter (R. 154-155).

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On the basis of these facts, the Board found that respondent's operations affected interstate commerce within the meaning of the National Labor Relations Act (R. 12), and that respondent's unfair labor practices "tend to lead to labor disputes burdening and obstructing commerce within the meaning of Section 2 (6) and (7) of the Act" (R. 35-36).

The only question here relates to the propriety of the Board's conclusion that it has jurisdiction over respondent's operations because its gross business was in excess of $500,000, notwithstanding the fact that respondent was strictly and solely engaged in intrastate commerce.

ARGUMENT

The Board cannot under the relevant provision of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, et seq.) assume jurisdiction by establishing a dollar amount of gross volume done for a company engaged solely in intrastate commerce.

Respondent was ordered by the National Labor Relations Board to cease and desist from committing unfair labor practices in violation of the National Labor Relations Act.[1] The Board had assumed jurisdiction of the matter since respondent's gross volume of business exceeded the Board's jurisdictional minimum of $500,000[2] and it purchased products from

[1] Specifically, Secs. 8(a) (1)-(a) (3), (a) (5) of the act, 49 Stat. 452 (1935), as amended, 29 U.S.C. Secs. 158(a) (1)-(a)(3), (a)(5) (1958) (Supp. II, 1959-1960).

[2] The Board's current standard for retail concerns is a gross yearly revenue of over $500,000. See NLRB Press Release No. 576, Oct. 2, 1958, 42 L.R.R.M. 96 (1958).

storage within the state whose origin was without the state.[3] After respondent's refusal to obey the order, the Board, pursuant to Section 10 (e) of the National Labor Relations Act,[4] petitioned the United States Court of Appeals for the Second Circuit for its enforcement. The Court held that the Board's findings on the merits were "adequately supported by substantial evidence"[5] but denied enforcement of the order and remanded the case to the NLRB "with instructions to take further evidence and make further findings on the manner in which a labor dispute (respondent) . . . affects or tends to affect commerce." *NLRB* v. *Reliance Fuel Oil Corp.*, 297 F. 2d 94, 99 (2d Cir. 1961).

Shortly after the decision in Reliance, but before rehearing was denied, the United States Court of Appeals for the First Circuit reached the same conclusion in *NLRB* v. *Benevento.*[6] With the same question before it,[7] the court remanded the case to the Board to make "clear findings of fact based upon legally sufficient evidence . . . to support its assertion of jurisdiction."[8]

---

[3] *N.L.R.B.* v. *Reliance Fuel Oil Corp.*, 297 F.2nd 94 (2d Cir. 1961). Respondent also had purchased truck parts valued at no more than a few hundred dollars from out of state. However, as the Board did not rest its jurisdiction on this, the court did not consider it. Id. at 95 n.l.

[4] 49 Stat. 454 (1935), as amended, 29 U.S.C. Sec. 160 (e) (1958).

[5] *NLRB* v. *Reliance Fuel Oil Corp.*, 297 F. 2d at 96.

[6] 297 F. 2d 873 (1st Cir. 1961).

[7] In Benevento, the Board applied its current $50,000 outflow or inflow standard for nonretail concerns. See NLRB Press Release No. 576, Oct. 2, 1958, 42 L.R.R.M. 96 (1958).

[8] 297 F. 2d at 876.

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The Wagner Act of 1935[9] grants jurisdiction to the NLRB over all employers engaged in interstate commerce or whose businesses affect interstate commerce. Section 2(7) of the act defines the term "affecting commerce" as:

> "In commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."[10]

It has been said that this grant of jurisdiction goes to the full extent of Congress' constitutional power[11] to prevent obstructions to interstate and foreign commerce[12] and that ultimately there is no business which is not subject to the act."[13]

The constitutionality of the Wagner Act was upheld in *NLRB* v. *Jones & Laughlin Steel Corp.*,[14] where the Supreme Court acquiesced in the Board's

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[9] National Labor Relations Act, 49 Stat. 449 (1935), 29 U.S.C. Sec. 151 (1958). This was subsequently amended by the Labor Management Relations Act, 61 Stat. 136 (1947), as amended, 29 U.S.C. Sec. 141 (1958) and the Labor-Management Reporting and Disclosure Act, 73 Stat. 519 (1959), as amended, 29 U.S.C. Secs. 401-531 (Supp. II, 1959-1960), so that the composite is the present federal law in the field of labor relations.

[10] 49 Stat. 450 (1935), 29 U. S. C. Sec. 152 (7) (1958).

[11] U. S. Constitution, art. 1, Sec. 8. "The Congress shall have Power . . . To regulate Commerce . . . among the several States, (and) . . . To make all Laws which shall be necessary and proper for carrying into Execution the forgoing Powers . . ."

[12] *International Bhd. of Elec. Workers* v. *NLRB*, 181 F.2d 34, 36 (2d Cir. 1950).

[13] Cox, Federalism in the Law of Labor Relations, 67 Harv. L. Rev. 1297, 1299 (1954).

[14] 301 U. S. 1 (1937).

ad hoc method of asserting jurisdiction.[15] In *Consolidated Edison Co.* v. *NLRB*,[16] the Court again approved the Board's ad hoc method[17] of asserting jurisdiction. The Court, however, did not predicate the Board's jurisdiction on a certain dollar value of out-of-state purchases but rather on the fact that many industries, themselves involved in interstate commerce, were supplied by Consolidated Edison.[18]

Both Jones & Laughlin and Consolidated Edison dealt with large corporations engaged in extensive interstate activities. But what of the small businessman whose products come from or reach interstate commerce? *NLRB* v. *Fainblatt*[19] made it clear that volume of business had little bearing on the applicability of the act.[20] The criterion, the Court said, was

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15 "Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to federal control, and hence to lie within the authority conferred upon the Board, is left by the statute to be determined as individual cases arise." Id. at 32.

16 305 U.S. 197 (1938).

17 Id. at 222.

18 In the instant case, the Board argued that this only infers that "where other, more dramatic, evidence of a connection with interstate commerce was present, the Court found it unnecessary to rest the case on the 'lesser' factors as well." Brief for Petitioner on Rehearing, p. 10. *NLRB* v. *Reliance Fuel Oil Corp.*, 297 F.2d 94 (2d Cir. 1962).

19 306 U.S. 601 (1939).

20 "The power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small . . . The language of the National Labor Relations Act seem to make it plain that Congress has set no restrictions upon the jurisdiction of the Board to be determined or fixed exclusively by reference to the volume of interstate commerce involved." Id. at 606. It should be noted that while the Court here was referring to an extension rather than a restriction, as in the instant case, of the Board's jurisdiction, the applicable principle remains the same, i.e., that there must be a showing of an effect on interstate commerce.

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the effect which the business had on interstate commerce. A few years later in *Polish Nat'l Alliance* v. *NLRB*,[21] the Court set forth what is now the accepted test of jurisdiction:

> Congress gave the Board authority to prevent practices "tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce. . . ."
>
> Congress therefore left it to the Board to ascertain whether proscribed practices would in particular situations adversely affect commerce when judged by the full reach of the constitutional power of Congress. Whether or not practices may be deemed by Congress to affect interstate commerce is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board. Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which, if left unchecked may well become far-reaching in its harm to commerce.[22]

Mr. Justice Black, however, in his concurring opinion, was not willing to go that far. He pointed out that while Congress had the power to enact laws which were "necessary and proper" to protect interstate commerce, clear findings of the effect on commerce have always been required "before subjecting local business to paramount federal regulation."[23]

In 1950, faced with the problem of a staggering case load and a limited budget, the Board, in accord-

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[21] 322 U. S. 643 (1944).

[22] Id. at 648.

[23] Id. at 652.

ance with the act,[24] promulgated jurisdictional standards.[25] Under these standards, the Board would exercise its powers only when the business involved had annual interstate purchases above certain minimum dollar values.[26] In 1954[27] and 1958[28] these standards were revised with a view toward limiting rather than expanding the Board's jurisdiction.

The prescribed standards, at first, seemed to solve the Board's caseload problem. However, after the revision in 1954, the Supreme Court, by its decision in *Guss* v. *Utah Labor Relations Bd.*,[29] created, in the labor-relations field, a so-called "no mans land."[30] In 1958 the Board relaxed its 1954 tests, limiting but not eliminating the "no mans land."[31] Section 701 of the Labor-Management Reporting and Disclosure

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[24] National Labor Relations Act Sec. 6(a), 49 Stat. 452 (1935), as amended, 29 U.S.C. Sec. 156 (1958).

[25] For a compilation of these standards, see 26 L.R.R.M. 50 (1950). See also *Hollow Tree Lumber Co.*, 91 N.L.R.B. 635 (1950). These standards reflected, for the most part, results reached by the Board in determining prior jurisdictional questions. 15 NLRB Ann. Rep. 5 (1950).

[26] The test later became a certain gross volume of business. See notes 27-28 infra.

[27] NLRB Press Releases Nos. 445 and 449, July 1 and 15, 1954, 34 L.R.R.M. 75 (1954).

[28] NLRB Press Release No. 576, Oct. 2, 1958, 42 L.R.R.M. 96 (1958). See *Siemons Mailing Service*, 122 N.L.R.B. 81 (1958). The 1958 standards are in effect today except that they were extended to include the hotel industry in 1959. NLRB Press Release No. 610, May 14, 1959, 44 L.R.R.M. 70 (1959). For a detailed enumeration of these standards, see Comment, 28 Fordham Law Review, 737, 747-48 (1960).

[29] 353 U. S. 1 (1957).

[30] The *Guss* decision precluded state courts and agencies from acting on matters over which, because they affected commerce, the NLRB had, but declined to assert, jurisdiction since the minimum dollar value standard had not been met. Ibid. See Notes, 26 Fordham L. Rev. 349 (1957); 71 Harv. L. Rev. 179 (1957); 56 Mich. L. Rev. 133 (1957).

[31] See note 28 supra.

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Act,[32] amending Section 14 of the Taft-Hartley Act, attempted[33] to eliminate the remaining area of the "no mans land." State courts and agencies, under this amendment are permitted to act on matters over which the Board has declined to assert jurisdiction. The Board's jurisdiction has been frozen, so to speak, by the Reporting and Disclosure Act since the Board cannot "decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959."[34] Although the standards had now received congressional approval, they have yet to be formally approved by the United States Supreme Court.[35]

In the present case, respondent, Reliance Fuel Oil Corp., sold fuel oil to and serviced oil burners and boilers for home owners, all of whom lived in New York State. In 1959 it purchased from Gulf Oil Corp. fuel oil and products valued at more than $650,000. This oil was refined outside New York State and eventually shipped to stationary storage tanks in New York. Respondent's trucks then withdrew the oil from the storage tanks and delivered it

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[32] 73 Stat. 541 (1959), 29 U.S.C. Sec. 164 (Supp. II, 1959-1960).

[33] Since the vast majority of states are without labor relations statutes, the complainant over whom the NLRB declines to assert jurisdiction because he did not meet its dollar value standard could be left without a remedy. Note, 29 Fordham L. Rev. 604 (1961). See Comment, 28 Fordham L. Rev. 737 (1960). However, it might be argued that since a federal question is involved, federal law should be applied by the state. The question has yet to be answered.

[34] Labor-Management Reporting and Disclosure Act of 1959 Sec. 701(a), 73 Stat. 541, 29 U.S.C. Sec. 164(c) (1) (Supp. II, 1959-1960).

[35] "This Court has never passed and we do not pass today upon the validity of any particular declination of jurisdiction by the Board or any set of jurisdictional standards." *Guss* v. *Utah Labor Relations Bd.*, 353 U.S. 1, 4 (1957). See S. Rep. No. 187, 86th Cong., 1st Sess. 26 (1959).

directly to its customers.[36] The trial examiner, whose decision was adopted by the Board, found that the NLRB had jurisdiction of the dispute.[37]

The United States Court of Appeals for the Second Circuit, in refusing to enforce the order reasoned:

"The Supreme Court, however, seems never to have gone so far as to hold that mere size of a local business or amount of its purchases within the state of materials the origin of which was outside the state, without relation to other factors necessarily brings it within the Act."[38] Anticipating possible review by the Supreme Court, the court stated that it seemed unlikely, because of the caution expressed in *Howell Chevrolet Co.* v. *NLRB*,[39] and *Polish Nat'l Alliance* v. *NLRB*,[40] that the Supreme Court would today adopt a pure "quantitative" test.[41] Therefore the

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[36] *Reliance Fuel Oil Corp.*, 129 N.L.R.B. 1166, 1170 (1961).

[37] Id. at 1171.

[38] 297 F. 2d at 97.

[39] 346 U.S. 482 (1953). This case involved an automobile dealer in California whose purchases from General Motors exceeded $1,000,000. The Court upheld the Board's assertion of jurisdiction because the evidence showed such a close supervision of the dealer's activities by General Motors that it was "'an integral part' of General Motors' national system of distribution." Id. at 484.

[40] 322 U.S. 643 (1944); see notes 21-23 supra and accompanying text.

[41] An analogy can be developed here. In a recent decision, *Tampa Elec. Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1961), 30 Fordham L. Rev. 493 (1962), the Supreme Court abandoned a "quantitative substantiality" test in favor of a "rule of reason" or "qualitative substantiality" test to determine market foreclosure under Section 3 of the Clayton Act, 38 Stat. 731 (1914), 15 U.S.C. Sec. 14 (1958). While the "quantitative" test in Tampa had originally been judicially imposed and in the instant case it has been imposed by the NLRB, an administrative body, the analogy remains, for the Supreme Court showed its willingness to abandon an easier, more practical test in favor of a more difficult to apply, yet fairer test.

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court remanded the case to the NLRB to take more evidence to fill in a "reasonably complete picture of the manner in which a work stoppage would affect commerce . . . before we rule on the jurisdictional issue."[42] In denying the petition for rehearing the court reiterated what it deemed to be the jurisdictional test laid down by Congress, namely:

"If the employer is himself engaged in interstate commerce, without more the jurisdiction of the Board is established. If the employer is not engaged in interstate commerce, the acts in question must lead or tend to lead to a dispute which must burden or obstruct the free flow of interstate commerce."[43]

Similarly in *Benevento*[44] the Board's jurisdiction was based on the trial examiner's finding that

> "during the calendar year preceding the issuance of the complaint, respondent sold products valued in excess of $50,000 to . . . which company during the same calendar year purchased and received, from sources outside the Commonwealth of Massachusetts, products valued in excess of $50,000."[45]

The first circuit in refusing to enforce the Board's order stated that "broad though the Board's power may be it is not unlimited."[46] The court reasoned that "the Board's jurisdiction is necessarily subject to bounds and the criterion for determining where

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[42] 297 F. 2d at 99.
[43] Ibid.
[44] 297 F. 2d 873 (1st Cir. 1961).
[45] Michael Benevento, 131 N.L.R.B. 358, 361 (1961).
[46] 297 F. 2d at 874.

those bounds lie is the effect, if any, of purely local action upon interstate commerce,"[47] and therefore concluded that "clear findings of fact based upon legally sufficient evidence must be made by the Board to support its assertion of jurisdiction."[48]

The NLRB's position in both cases is that since respondents met its gross dollar standard and dealt with firms engaged in commerce, they must necessarily affect interstate commerce. As previously noted, originally the Board's jurisdiction was so broad that it heretofore imposed limitations upon itself.[49] In both of these cases, however, it seems that the Board, by its preoccupation with jurisdictional standards, has overlooked the original test laid down by Congress.[50] Throughout the years the Supreme Court has consistently maintained that it is the effect on commerce and not a gross volume of business which is the standard.[51]

While it is arguable that a company which does a gross volume of business in excess of $500,000 and which purchases its products from one engaged in interstate commerce[52] would, if involved in a labor dispute, affect interstate commerce, such a conclusion, as the NLRB has itself admitted, is not a necessary

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47 Id. at 875.

48 Id. at 876.

49 See notes 24-28 supra and accompanying text.

50 See note 15 supra.

51 See notes 14-23 supra and accompanying text.

52 Or, as in *Benevento*, that one who sells products valued in excess of $50,000, to one who purchases products from outstide the state.

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conclusion.[53] By virtue of its present argument, however, it would appear that the Board has reversed its former position.

The Board's present position is a pragmatic one; if it is forced to take more evidence in these cases it would have to drastically revise its present procedure of deciding jurisdictional questions. But the Board itself has recognized the dual requirement before it can assert jurisdiction.[54]

It may be that the Supreme Court will agree with the Board and in approving its standards promulgate an easily applied "quantitative" test. In reaching this conclusion the Court might rely on the congressional approval given the standards in the Labor-Management Reporting and Disclosure Act.[55] This

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[53] "It is possible, although highly improbable, that an enterprise meeting the gross dollar standards of the Board would not come within the broad definition of 'affecting commerce,' even though that term has been judicially determined to indicate an intention on the part of Congress to exercise Federal jurisdiction to the fullest possible extent. For this reason we agree . . . that the gross dollar volume test, standing alone, is insufficient to confer upon the Board the jurisdiction contemplated by the Act." *International Longshoremen & Warehousemen's Union*, 124 N.L.R.B. 813, 815 (1959).

[54] "The Board's current standard for exercising jurisdiction over a retail enterprise which falls within its statutory jurisdiction is 'a gross volume of business of at least $500,000 per annum . . . .' In such instances 'some proof must be made of legal jurisdiction,' that is, that the employer involved is engaged in commerce or that his operations affect commerce . . . in addition to a showing that the relevant gross volume test has been satisfied." *Westside Market Owners Ass'n*, 126 N.L.R.B. 167, 169 (1960); see *James D. Jackson*, 126 N.L.R.B. 875 (1960); *International Longshoremen & Warehousemen's Union*, supra note 53.

[55] Section 701(a) of the act, 73 Stat. 541 (1959), 29 U.S.C. Sec. 164(c) (1) (Supp. II, 1959, 1960); see notes 32-35 supra and accompanying text.

seems unlikely for two reasons: First, the act still requires a showing of an effect on commerce and second, had Congress wanted to adopt a single quantitative test it would have expressly done so.

It is respectfully submitted that the first and second circuits' adherence to the established principles laid down in *Jones & Loughlin, Consolidated Edison, Polish National Alliance,* and *Fainblatt* is far more just and legally sound than the Board's reliance on its non-judicially approved self imposed standards.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the Court below should be affirmed.

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September 24, 1962.

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